IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

CASE NO.: 17-CV-00308

JAMES VAN WINKLE,)
)
Plaintiff,)
)
v.)
)
QEH ATASCOCITA, LLC a/k/a ATASCOCITA PLAZA, REDHEADED STEPCHILD, LLC. a/k/a FIREHOUSE SUBS, CAM HUY TROUNG d/b/a PHO AN RESTAURANT #3, ERICA ROX, INC. d/b/a ON THE ROX SPORTS BAR,)
)
)
Defendants.)
)

COMPLAINT

Plaintiff JAMES VAN WINKLE (**"Plaintiff"**), pursuant to the Americans with Disabilities Act 42 U.S.C. §§ 12101–12103, 12181–12205a (**"ADA"**) and the Americans with Disabilities Act Accessibility Guidelines 28 C.F.R. § 36 (**"ADAAG"**), hereby sues Defendants QEH ATASCOCITA, LLC a/k/a ATASCOCITA PLAZA (**"Defendant Atascocita Plaza"**), REDHEADED STEPCHILD, LLC. a/k/a FIREHOUSE SUBS (**"Defendant Firehouse Subs"**), CAM HUY TROUNG d/b/a PHO AN RESTAURANT #3 (**"Defendant Pho An #3"**), ERICA ROX, INC. d/b/a ON THE ROX SPORTS BAR (**"Defendant On the Rox)** (Collectively **"Defendants"**) for injunctive relief and states:

JURISDICTION AND VENUE

1. This Court has original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 for Plaintiff's claims under the ADA.

2. Venue in this district is proper under 28 U.S.C. § 1391 because the real property that is the subject of this action is located in, and the acts or omissions giving rise to this action occurred in the Southern District of Texas.

PARTIES

3. Plaintiff is an individual over 18 years of age, *sui juris*, who is a resident of Montgomery County, Texas.

4. Plaintiff is a qualified individual under the ADA because he is a disabled individual who has physical impairments that substantially limits one or more major life activities.

5. Specifically, Plaintiff has a physical impairment that requires him to use a wheelchair to ambulate.

6. Defendant Atascocita Plaza is a Domestic Limited Liability Company authorized to, and doing business in, Harris County, Texas.

7. Defendant Atascocita Plaza is the owner, lessor, or operator of real property (and the improvements made thereon) and related facilities located at 7058 FM 1960 Road E, Humble, Texas 77346 ("**Atascocita Plaza**").

8. Defendant Firehouse Subs is a Domestic Limited Liability Company authorized to, and doing business in, Harris County, Texas.

9. Defendant Firehouse Subs is the owner, lessee or operator of the **restaurant** know as Firehouse Subs located on the Subject Premises with the specific address 7036 FM 1960 E., Unit A-2, Humble, TX 77346.

10. Defendant Pho An #3 is a business owned by an individual over 18 years of age, *sui juris*, who is a resident of the State of Texas.

11. Defendant Pho An #3 is the owner, lessee or operator of the **restaurant** know as Pho An Restaurant #3 located on the Subject Premises with the specific address 6902 FM 1960 Rd E; Humble, Texas 77346.

12. Defendant On the Rox is a Domestic Limited Liability Company authorized to, and doing business in, Harris County, Texas.

13. Defendant On the Rox is the owner, lessee or operator of the **bar** know as On the Rox Sports Bar & Grill located on the Subject Premises with the specific address 7054 FM 1960, Humble, TX 77346.

14. The foregoing properties and related facilities will collectively be referred to as "**Subject Premises**".

GENERAL ALLEGATIONS

15. The Subject Premises is a place of public accommodation under the ADA and ADAAG because they are shopping centers, restaurants and bars.

16. As a place of public accommodation, Defendants were required to remove from the Subject Premises and related facilities architectural barriers to the extent readily achievable as defined in 28 C.F.R. § 36.304 of the ADAAG.

17. Additionally, upon information and belief, the Subject Premises is one that was altered after January 26, 1992, as defined in 28 C.F.R. § 36.402 of the ADAAG.

18. Accordingly, Defendants were required to ensure that, to the maximum extent feasible, the altered portions of the Subject Premises were readily accessible to and useable by individuals with disabilities such as Plaintiff.

19. Plaintiff has knowledge that the Subject Premises is in violation of the ADA and discriminating against individuals with disabilities.

20. In or about 2016, Plaintiff visited the Subject Premises to purchase food and drinks and encountered architectural barriers to access the Subject Premises.

21. Plaintiff sought, and seeks, to partake in the accommodations, privileges, and advantages of the services offered by Defendants; however, he was subjected to discrimination by Defendants on the basis of his disability due to Defendants' ADA violations.

22. Plaintiff was not able to access, among other things, entrance access and path to travel, parking, access to goods and services or public restrooms without encountering architectural barriers.

23. Plaintiff intends to return to the Subject Premises once the barriers violating the ADA are removed; however, Plaintiff is currently deterred from returning as a result of the barriers to access present at the Subject Premises.

24. Plaintiff will be denied full access to the Subject Premises, as provided by the ADA, unless the injunctive relief requested herein is granted.

25. Plaintiff has reasonable grounds to believe that he will continue to be subjected to discrimination in violation of the ADA by Defendants if said violations are not corrected and made compliant.

26. Plaintiff is also a tester for the purpose of asserting his civil rights by monitoring, ensuring, and determining whether places of public accommodation are in compliance with the ADA.

27. Plaintiff intends to visit the Subject Premises again, not only to shop and purchase food, but to assure himself that the Subject Premises is in compliance with the ADA and thus ensuring that individuals with disabilities, including himself, will have full and equal enjoyment of the property without fear of discrimination.

28. Plaintiff has a real, continuing, and immediate threat of future discrimination by Defendants' violations and non-compliance with the ADA because he intends on returning to the Subject Premises in the near future.

29. Defendants have discriminated and continue to discriminate against Plaintiff by denying him access to the Subject Premises and the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the Subject Premises in violation of the ADA by failing to remove architectural barriers so that the Subject Premises may be accessible to and usable by individuals with disabilities such as Plaintiff.

30. Defendants are in violation of the ADA and ADAAG and is discriminating against Plaintiff as a result of the following violations:

DEFENDANT ATASCOCITA PLAZA

Parking

a. Where posted, signage at some of the designated accessible parking spaces is not mounted at sufficient heights and there are accessible parking spaces that do not provide signs designating them as accessible, violating Section 4.6.4 of the ADAAG and Section 502.6 of the 2010 ADA Standards, whose resolution is readily achievable.

b. The Plaintiff had difficulty exiting the vehicle, as an access aisle of the required width is not provided. Violation: There are accessible parking spaces that do not have compliant access aisles provided, violating Sections 4.1.2(5a) and 4.6.3 of the ADAAG and Section 502.3.1 of the 2010 ADA Standards, whose resolution is readily achievable.

c. The Plaintiff had difficulty accessing the facility, as the designated accessible parking spaces are not located on the shortest accessible route to the facility. Violation: Some of the accessible parking spaces are not located closest to the accessible path of travel to the facility, violating Section 4.6.2 of the ADAAG and Section 208.3.1 of the 2010 ADA Standards, whose resolution is readily achievable.

Entrance Access and Path of Travel

d. The Plaintiff had difficulty traversing the path of travel, as it was not continuous and accessible. Violation: There are inaccessible routes between buildings at the facility. These are violations of the requirements in Sections 4.3.2(2), 4.3.8, 4.5.2, and 4.7.1 of the ADAAG and Sections 206.2.2, 303, 402 and 403, whose resolution is readily achievable.

e. The Plaintiff had difficulty using some of the curb ramps, as the slopes were excessive. Violation: There are curb ramps at the facility that contain excessive slopes or cross slopes in violation of Section 4.7.2 of the ADAAG and Sections 405.2 and 406.1 of the 2010 ADA Standards, whose resolution is readily achievable.

f. The Plaintiff could not traverse through areas of the facility, as the required 36" path is not provided due to shopping carts that obstruct the path of travel outside of Aldi Supermarket. Violation: There is not a continuous path of travel connecting all exterior spaces of the facility, violating Sections 4.2.1 and 4.3.3 of the ADAAG and Sections 36.211 and 403.5.1 of the 2010 ADA Standards, whose resolution is readily achievable.

DEFENDANT ATASCOCITA PLAZA
AND DEFENDANT FIREHOUSE SUBS

Access to Goods and Services

g. The restaurant fails to make reasonable accommodations in policies, practices and procedures to provide full and equal enjoyment of disabled individuals and does not maintain the elements that are required to be readily accessible and usable by persons with disabilities in violation of Section 36.211 of the ADA Standards.

Public Restrooms

h. The Plaintiff could not transfer to the toilet without assistance, as a trashcan obstructed the clear floor space. Violation: The required clear floor space is not provided next to the toilet, violating Section 4.16.2 and Figure 28 of the ADAAG and Sections 36.211 and 604.3 of the 2010 ADA Standards, whose resolution is readily achievable.

i. The Plaintiff had difficulty using the toilet without assistance, as it was not mounted at the required distance from the side wall. Violation: The water closet is mounted at a non-compliant distance from the side wall, violating Section 4.16.2 and Figure 28 of the ADAAG and Section 604.2 of the 2010 ADA Standards, whose resolution is readily achievable.

j. The Plaintiff had difficulty using the rear grab bar, as the toilet is mounted less than 1 ½” below it obstructing its use. Violation: The grab bars do not comply with the requirements prescribed in Sections 4.16.4 and 4.26 of the ADAAG and Section 609.3 of the 2010 ADA Standards, whose resolution is readily achievable.

DEFENDANT ATASCOCITA PLAZA
AND DEFENDANT PHO AN 3

Public Restrooms

k. There are permanently designated interior spaces without proper signage, violating Section 4.1.3(16) and 4.30 of the ADAAG and Sections 216.2 and 703 of the 2010 ADA Standards, whose resolution is readily achievable.

l. The Plaintiff had difficulty using the toilet without assistance, as it was not mounted at the required distance from the side wall. Violation: The water closet is mounted at a non-compliant distance from the side wall in violation of Section 4.16.2 and Figure 28 of the ADAAG and Section 604.2 of the 2010 ADA Standards, whose resolution is readily achievable.

m. The Plaintiff could not transfer to the toilet without assistance, as the grab bars are mounted too high. Violation: The grab bars do not comply with the requirements prescribed in Section 4.16.4 and Figure 29 of the ADAAG and Sections 604.5 and 609 of the 2010 ADA Standards, whose resolution is readily achievable.

n. The Plaintiff could not use the mirror, as it was mounted too high. Violation: The mirrors provided for public use in the restroom are in violation of the requirements in Section 4.19.6 of the ADAAG and Section 603.3 of the 2010 ADA Standards, whose resolution is readily achievable.

DEFENDANT ATASCOCITA PLAZA
AND DEFENDANT ON THE ROX

Access to Goods and Services

o. The Plaintiff could not utilize the bar counter, as it is mounted too high. Violation: There are bar counters that are not at the prescribed height, violating Section 4.32.4 and 5.2 of the ADAAG and Section 902.3 of the 2010 ADA Standards, whose resolution is readily achievable.

Public Restrooms

p. The Plaintiff could not enter the restroom area without assistance, as the required maneuvering clearance is not provided. Violation: There are interior doors that do not provide the required latch side clearance violating Section 4.13.6 of the ADAAG, whose resolution is readily achievable.

q. The Plaintiff could not close the accessible toilet compartment door as it was not self-closing and did not have compliant door hardware. Violation: The accessible toilet compartment door does not provide hardware and features that comply with Sections 4.17.5 and 4.13.9 of the ADAAG and Sections 309.4 and 604.8.1.2 of the 2010 ADA Standards, whose resolution is readily achievable.

r. The Plaintiff could not transfer to the toilet without assistance, as the grab bars are mounted too high and the toilet paper dispenser is mounted less than 12” above the side grab bar. Violation: The grab bars in the accessible toilet compartment do not comply with the requirements prescribed in Sections 4.17.6 and 4.26 of the ADAAG and Sections 604.5 and 609 of the 2010 ADA Standards, whose resolution is readily achievable.

s. The Plaintiff could not use the coat hook without assistance as it was mounted too high. Violation: There are coat hooks provided for public use in the restroom, outside the reach ranges prescribed in Sections 4.2.5, 4.2.6, and 4.25.3 of the ADAAG and Sections 308 and 604.8.3 of the 2010 ADA Standards, whose resolution is readily achievable.

t. The Plaintiff was exposed to a cutting/burning hazard because the lavatory pipes were not wrapped. Violation: The lavatory pipes were not fully wrapped or maintained violating Section 4.19.4 of the ADAAG and Section 606.5 of the 2010 ADA Standards, whose resolution is readily achievable.

u. The Plaintiff could not use the mirror, as it was mounted too high. Violation: The mirrors provided for public use in the restroom are in violation of the requirements in Section 4.19.6 of the ADAAG and Section 603.3 of the 2010 ADA Standards, whose resolution is readily achievable.

31. The discriminatory violations described herein may not be an exclusive list of Defendants' ADA violations because Plaintiff was unable to access and assess all areas of the Subject Premises due to the architectural barriers encountered. A *complete* list of the Subject Premises' ADA violations, and the remedial measures necessary to remove same, will require an on-site inspection by Plaintiff's representatives pursuant to Federal Rule of Civil Procedure 34.

32. By encountering the discriminatory conditions at the Subject Premises, and knowing that it would be a futile gesture to return unless Plaintiff is willing to endure additional discrimination, Plaintiff is deprived of the meaningful choice of freely visiting the Subject Premises and deterred and discouraged from traveling to same when in contrast the Subject Premises is readily available to able bodied patrons and the general public.

33. By maintaining a place of public accommodation with ADA violations, Defendants deprive Plaintiff of the equal opportunity offered to the general public to freely travel and conduct business at the Subject Premises without fear of being subjected to discrimination.

34. Plaintiff retained undersigned counsel for the filing and prosecution of this action and has agreed to pay counsel reasonable attorneys' fees and costs incurred in this action for which Plaintiff is entitled to recover pursuant to 42 U.S.C. § 12205.

35. Plaintiff demands a non-jury trial on all issues to be tried herein.

CLAIM FOR INJUNCTIVE RELIEF
(Against Defendants for ADA Violations)

36. Plaintiff re-avers and incorporates paragraphs 1–35 as if fully set forth herein.

37. This action arises pursuant to the ADA.

38. Plaintiff has been denied access to, and has been denied the benefits of, services, programs, or activities of the Subject Premises and its facilities, and has otherwise been

discriminated against and damaged by Defendants because of the Subject Premises' existing ADA violations.

39. Plaintiff will continue to suffer such discrimination, injury, and damage and will be deterred from returning to the Subject Premises without the relief demanded herein pursuant to the ADA.

40. Plaintiff has suffered, and continues to suffer, frustration and humiliation as a result of the discriminatory conditions present at the Subject Premises.

41. By continuing to operate the Subject Premises with discriminatory conditions in violation of the ADA and ADAAG, Defendants contribute to Plaintiff's sense of isolation and segregation and deprives Plaintiff of the full and equal enjoyment of the goods, services, facilities, privileges, and accommodations available to the able bodied individuals of the general public.

42. Pursuant to 42 U.S.C. § 12188, this Court is provided broad authority to grant Plaintiff's demand for injunctive relief, which includes an order to alter the Subject Premises, make the Subject Premises readily accessible to, and useable by, individuals with disabilities to the extent required by the ADA, and close the Subject Premises until the requisite modifications are complete.

WHEREFORE, Plaintiff JAMES VAN WINKLE respectfully requests this Court issue a permanent injunction enjoining Defendants QEH ATASCOCITA, LLC a/k/a ATASCOCITA PLAZA, REDHEADED STEPCHILD, LLC. a/k/a FIREHOUSE SUBS, CAM HUY TROUNG d/b/a PHO AN RESTAURANT #3, and ERICA ROX, INC. d/b/a ON THE ROX SPORTS BAR from continuing its discriminatory practices, ordering Defendants to alter the Subject Premises as appropriate to comply with the ADA and ADAAG, ordering Defendants to maintain accessible features at the premises, awarding reasonable attorneys' fees and costs incurred in this action, and closing the Subject Premises until the requisite modifications are completed, and for such further relief this court deems just and proper.

Dated this 31st day of January, 2017.

Respectfully submitted,

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